9 FAM 42.32(d)(2) Notes

(TL:VISA-350; 01-25-2002)

9 FAM 42.32(d)(2) N1 Two-Step Acquisition of Status

(TL:VISA-54; 02-28-1992)

As a result of the Immigration Act of 1990, this class, like most other special immigrant classes described in INA 101(a)(27), will now require classification under employment-based fourth preference. Unlike the other such classes, however, the acquisition of special immigrant status under INA 101(a)(27)(D) and fourth preference classification will require two sequential steps, prior to visa issuance rather than the one-step process associated with other categories.

9 FAM 42.32(d)(2) N2 Step One—Status as Special Immigrant

9 FAM 42.32(d)(2) N2.1 Principal Officer's Recommendation

(TL:VISA-54; 02-28-1992)

The first step is acquiring special immigrant status. The basic statutory requirements for special immigrant status under INA 101(a)(27)(D) are set forth in 9 FAM 42.32(d)(2) Related Statutory Provisions and elaborated in 9 FAM 42.32(d)(2) Notes. It is most essential that the principal officer recommend the granting of special immigrant status to an employee or former employee in exceptional circumstances and that the Secretary of State find it in the national interest to approve the recommendation. There is no specified form for such recommendation but the recommendation must include the elements itemized in 9 FAM 42.32(d)(2) PN2.2.

9 FAM 42.32(d)(2) N2.2 Supporting Evidence

(TL:VISA-191; 05-07-1999)

The Department of State (CA/VO/L/A) must determine each case upon its individual merits. Consequently, the post must identify and document specific circumstances of an alien's case that establish entitlement to status. The post shall submit supporting documentation to ensure that the Department has sufficient information on which to base a decision. In determining whether an alien meets the "exceptional circumstances" requirement, the Department uses the standards cited in 9 FAM 42.32(d)(2) N6.5. The post must submit evidence that clearly relates to the factors cited in the note, and should avoid general narrative descriptions of the alien's service history.

9 FAM 42.32(d)(2) N2.3 Department Decision

(TL:VISA-54; 02-28-1992)

If the evidence fulfills the requirements of the law and the Department determines that the granting of special immigrant status is in the national interest, the Department will notify the post of the approval of the recommendation.

9 FAM 42.32(d)(2) N2.4 Section 152 Employees in Hong Kong

9 FAM 42.32(d)(2) N2.4-1 Employees of U.S. Consulate in Hong Kong

(TL:VISA-331; 11-07-2001)

a. Section 152 of the Immigration Act of 1990, (Pub. L. 101-649) as amended by section 302(d)(1) of the Miscellaneous and Technical Immigration Naturalization Amendments of 1991 (Pub. L. 102-232), extends special immigrant status under certain circumstances to aliens employed under the authority of the U.S. Chief of Mission in Hong Kong who have not worked for the usual 15-year period. This includes those employees hired pursuant to section 5913 of title 5 of the U.S.C., i.e., the personal domestic servants of the Chief of Mission and Deputy Principal Officer, as well as any other employee hired by a U.S. Government official acting under the authority of the Chief of Mission. It does not, however, include employees of contractors hired by an officer of the Consulate. [See 9 FAM 42.32(d)(2) N4.4 below.]

b. Members of the immediate family are entitled to derivative status provided they are residing in the same household. [See 9 FAM 42.32(d)(2) N2.4-3 paragraph b below.]

9 FAM 42.32(d)(2) N2.4-2 Employees Eligible for Consideration

(TL:VISA-54; 02-28-1992)

The language “under the authority of the Chief of Mission” covers more than direct hire employees of the Consulate General. Other employees who qualify for the benefits of section 152 are:

(1) Non-U.S. employees under personal services contracts to various agencies;

(2) Non-U.S. employees of the U.S. Servicemen’s Guides Association; and

(3) Non-U.S. employees of the U.S. Army and Air Force Exchange Service.

9 FAM 42.32(d)(2) N2.4-3 Classification Criteria

(TL:VISA-331; 11-07-2001)

a. The basic criteria for status under INA 101(a)(27)(D) for Hong Kong employees differ substantially from the usual requirements. [See 22 CFR 42.32(d)(2)(ii).] These differences are:

(1) Only three rather than 15 years of service are required;

(2) The three years of service must be service under the authority of the Chief of Mission in Hong Kong;

(3) The definition of derivative beneficiaries is much broader than the usual spouses and children; and

(4) The employee or a family member must be subject to clear threat attributable to service with the U.S. Government.

b. A member of the immediate family as defined in 6 FAM 111.3-1, r, is as follows:

"(1) Children who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support. The term shall include, in addition to natural offspring, stepchildren and adopted children and those under legal guardianship of the employee or the spouse when such children are expected to be under such legal guardianship at least until they reach 21 years of age and when dependent upon and normally residing with the guardian;

(2) Parents (including stepparents and legally adoptive parents) of the employee or spouse, when such parents are at least 51 percent dependent on the employee for support....

(3) Sisters and brothers (including stepsisters or stepbrothers or adoptive sisters or brothers) of the employee, or of the spouse, when such sisters and brothers are at least 51 percent dependent on the employee for support, unmarried and under 21 years of age, or regardless of age, are incapable of self-support....

(4) Spouse."

9 FAM 42.32(d)(2) N2.4-4 Inapplicability to Retirees

(TL:VISA-54; 02-28-1992)

The special provisions of section 152 apply only to aliens who are employed by the Consulate at the time the petition is filed. They do not apply to former employees of the Consulate.

9 FAM 42.32(d)(2) N3 Step Two—-Classification under INA 203(b)(4)

(TL:VISA-350; 01-25-2002)

The second step is acquiring status under INA 203(b)(4). Classification as an employment-based fourth preference immigrant requires the filing of a petition to accord such status. Unlike aliens in the other special immigrant classes, whose petitions must be filed with INS, U.S. Government employee/retiree special immigrants under INA 101(a)(27)(D) (including section 152 employees) must file the Form DS-1844, Petition to Classify Special Immigrant Under INA 203(b)(4) *As an Employee or Former Employee of the U.S Government Abroad*, petitions at a consular office [see Exhibit I]. The applicant may not file such a petition, however, until he or she has been notified that the Secretary of State has approved special immigrant status for them. [See 9 FAM 9 FAM 42.32(d)(2) PN5.]

9 FAM 42.32(d)(2) N4 Determining U.S. Government Service Abroad

9 FAM 42.32(d)(2) N4.1 Defining "Employee"

9 FAM 42.32(d)(2) N4.1-1 General

(TL:VISA-191; 05-07-1999)

To qualify as a special immigrant U.S. Government employee, the alien must meet the definition of "employee" as defined by section 2105 of 5 U.S.C., which reads:

"For the purpose of this title, "employee", …means an officer and an individual who is—

(1) appointed in the Civil Service by one of the following acting in an official capacity—

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a Uniformed Service;

(D) an individual who is an employee under this section;

(E) the head of a Government-controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of this position."

9 FAM 42.32(d)(2) N4.1-2 Section 152 Employees

(TL:VISA-191; 05-07-1999)

For the definition of "employee" as it pertains to section 152 of the Immigration Act of 1990 (Hong Kong), see 9 FAM 42.32(d)(2) N2.4 above.

9 FAM 42.32(d)(2) N4.1-3 Employee Service in Other Agencies

(TL:VISA-191; 05-07-1999)

If part of an employee's service has been for a department or agency of the U.S. Government other than the Department of State, this service must be established from the official records of the agency.

9 FAM 42.32(d)(2) N4.2 U.S. Armed Forces Service

(TL:VISA-3; 08-30-1987)

An alien serving in the U.S. Armed Forces abroad is considered to be "an employee of the U.S. Government abroad."

9 FAM 42.32(d)(2) N4.3 Service with Philippines Scouts

(TL:VISA-3; 8-301-1987)

Service with the Philippines Scouts prior to July 4, 1946, is considered to be service in the U.S. Armed Forces.

9 FAM 42.32(d)(2) N4.4 Employment as or with Private Contractor

(TL:VISA-83; 08-13-1993)

a. **Personal Services Contract.** Employees under a personal services contract with the U.S. Government qualify as U.S. Government employees. The distinguishing feature of a personal services contract is that the employee contracts directly with an agency or department of the U.S. Government as opposed to being hired by and paid through a contractor whose job is to provide a service or supply a specified number of employees to a U.S. agency or department. Therefore, if an employee is hired by and paid through a contractor he or she does not qualify for special immigrant status. This also applies to individuals employed by third-party contractors, including foreign governments. If employed directly by the U.S.

Government, the applicant would qualify for a special immigrant "SE-1" recommendation.

b. **Purchase Orders**. The Department makes no distinction between those persons hired under purchase orders and those persons employed under personal services contracts. Both must be paid by U.S. Government funds, and not paid indirectly by a company to perform services for the U.S. Government. Employees hired by purchase order or personal services contracts must meet the requirements for special service, high quality of job performance, exceptional circumstances of employment, and intent to resign and immigrate to the United States within one year of special immigrant approval.

9 FAM 42.32(d)(2) N4.5 Employees of U.S. Employee Recreation Associations

(TL:VISA-83; 08-13-1993)

a. Nonpersonal service contracts for previously allowed employee associations are being phased out. Recreation associations on a post-by-post basis will soon implement conversion to personal services contracts (PSCs) for their employees. If the local government labor regulations have always considered the employees of recreation associations to be a part of the U.S. Government, then the Department transfers annual and sick leave accrued by employees previously hired under nonpersonal service contracts as creditable service under the new PSCs. If, however, those individuals were considered by local government labor laws to be non-U.S. Government employees performing a service only for the U.S. Government, their time spent under nonpersonal services contracts would not be credited toward U.S. Government employment.

b. On this basis, once an employee association converts its employees to PSCs, the Department will then be able to consider their employees for special immigrant status. If the employee's time spent on the job does not transfer at the time of the conversion, then those employees will begin the count towards the 15-year minimum of U.S. Government employment abroad for SE-1 status from the first day of their personal services contract.

9 FAM 42.32(d)(2) N4.6 Status of Household Servants

(TL:VISA-83; 08-13-1993)

Household servants are personal employees of the individual officer who may retain or dismiss them. The fact that their salaries are partially covered by the funds of the ambassador, DCM, principal officer, etc. does not change the fact that they are employed by the individual and not the U.S. Government. Such employees do not qualify for special immigrant status.

9 FAM 42.32(d)(2) N5 U.S. Government Service Abroad

(TL:VISA-3; 08-30-1987)

The term “abroad” as defined in INA 101(a)(38) refers to any part of the world outside the “United States.”

9 FAM 42.32(d)(2) N5.1 Employment in Canal Zone

(TL:VISA-3; 08-30-1987)

An employee of the former administration of the Canal Zone may be considered for the benefits of INA 101(a)(27)(D) since the Canal Zone is not defined as part of the United States.

9 FAM 42.32(d)(2) N5.2 U.S. Government Service in Philippines

(TL:VISA-3; 08-30-1987)

Service as an employee in the U.S. Government in the Philippines prior to the independence of the Philippines on July 4, 1946, is considered service “abroad” within the meaning of INA 101(a)(27)(D).

9 FAM 42.32(d)(2) N6 Approval Standards for Special Immigrant Status under INA 101(a)(27)(D)

9 FAM 42.32(d)(2) N6.1 Defining “Honorably Retired”

(TL:VISA-54; 02-28-1992)

A former employee of the U.S. Government abroad seeking classification under INA 101(a)(27)(D) must establish that he or she is “honorably retired” as the term is used in the statute. An employee whose termination is a result of reduction-in-force, separation due to age, voluntary retirement, or resignation for personal reasons, can be considered “honorably retired". Separation not within the meaning of “honorably retired” would involve forced or requested removal for cause or a resignation aimed at forestalling such removal.

9 FAM 42.32(d)(2) N6.2 Defining “Faithful Service”

(TL:VISA-54; 02-28-1992)

An alien seeking classification under INA 101(a)(27)(D) must have performed faithfully in the position held. The principal officer has primary responsibility for determining whether the alien’s service has met this requirement. A record of disciplinary actions that have been taken against the employee does not automatically disqualify the employee. The principal

officer should assess the importance of any such disciplinary actions in light of:

(1) The gravity of the reasons for the disciplinary action; and

(2) Whether the record as a whole, notwithstanding existing disciplinary actions, is one of faithful service.

9 FAM 42.32(d)(2) N6.3 Years of U.S. Government Service

(TL:VISA-54; 02-28-1992)

Unless entitled to status under section 152 of the Immigration Act of 1990, as amended, an alien must have been employed for a total of at least 15 full-time years in the service of the U.S. Government abroad. Aliens entitled to status under section 152 of the Immigration Act of 1990, as amended, must have at least three years of U.S. Government service under the authority of the Chief of Mission in Hong Kong.

9 FAM 42.32(d)(2) N6.3-1 Full-Time Service

(TL:VISA-54; 02-28-1992)

Although the total employment period must equal at least 15 years of full-time service (or three years in the case of an alien eligible under section 152), the employee need not have worked full-time throughout the period. For example, if the employee worked full-time for 10 years and half-time for at least 10 more, that equivalent of 15 years of full-time employment would qualify the employee for consideration.

9 FAM 42.32(d)(2) N6.3-2 Continuity

(TL:VISA-54; 02-28-1992)

The employee's period of service need not have been continuous. For example, if an alien was employed for nine years, left for a period of time, and later returned to U.S. Government service for six or more years, this would meet the 15-year requirement.

9 FAM 42.32(d)(2) N6.3-3 Where and for Whom Is Irrelevant

(TL:VISA-54; 02-28-1992)

Except with regard to employment in Hong Kong under section 152 of the Immigration Act of 1990, the location of the employment does not matter as long as it meets the definition of abroad. Similarly, it does not matter if the employment was with different agencies, provided that it all meets the definition of U.S. Government employment.

9 FAM 42.32(d)(2) N6.4 Principal Officer's Recommendation

(TL:VISA-54; 02-28-1992)

The "principal officer of a Foreign Service establishment" must make the recommendation to the Secretary of State for favorable action under INA 101(a)(27)(D). This term embraces not only principal officers or acting principal officers of consular posts and chiefs or acting chiefs of diplomatic missions but also heads of field offices of other U.S. Government departments or agencies abroad. The District Administrator of the Trust Territory of the Pacific Islands is also considered a "principal officer" of a Foreign Service establishment for purposes of INA 101(a)(27)(D).

9 FAM 42.32(d)(2) N6.5 "Exceptional Circumstances" Requirement

(TL:VISA-54; 02-28-1992)

The principal officer's recommendation that an alien be granted special immigrant status under INA 101(a)(27)(D) must be made in "exceptional circumstances." The legislative history of this provision does not indicate specifically what such "exceptional circumstances" might be. However, Congress clearly did not intend that an alien be granted the benefits of INA 101(a)(27)(D) simply as recognition for the requisite years of service.

9 FAM 42.32(d)(2) N6.5-1 Categories of "Exceptional Circumstances"

(TL:VISA-3; 08-30-1987)

a. "Exceptional circumstances" fall broadly within three categories:

(1) "Exceptional circumstances" of a prima facie nature;

(2) Cases that strongly merit consideration of a finding of "exceptional circumstance"; and

(3) Cases which demonstrate other bases for a finding of "exceptional circumstances."

b. Cases falling under the first category will more likely be of an objective nature than categories 2 and 3. Category 2 will be more objectively oriented than category 3. It is important that the consular officer submit documentation which strongly indicates that there were "exceptional circumstances" present in an employee's case.

9 FAM 42.32(d)(2) N6.5-2 "Exceptional Circumstances" of Prima Facie Nature

(TL:VISA-331; 11-07-2001)

The principal officer's recommendation should describe the exceptional circumstances in full detail. The following factors are illustrative of situations in which an employee's service with the U.S. Government may be deemed to have the necessary "exceptional circumstances":

(1) Relations between the alien employee's country of nationality and the United States have been severed;

(2) The country in which the alien employee was employed and the United States have severed diplomatic relations;

(3) The country in which the alien employee was employed and the United States have strained relations and in which the employee may be subjected to persecution by the local government merely because of association with the U.S. Government, or where the circumstances are such that the employee may be pressured to divulge information available to him which would be contrary to U.S. national interests; and

(4) The alien was hired as an employee at the Consulate General at Hong Kong on or before July 1, 1999 and has at least 15 years of faithful service. (99 State 124186.)**9 FAM 42.32(d)(2) N6.5-3 Cases Strongly Meriting Consideration Based on "Exceptional Circumstances"**

(TL:VISA-11; 05-05-1988)

In some cases, an employee has in the course of "faithful service" fulfilled responsibilities or rendered service so far beyond the call of duty that some form of recognition is merited. If circumstances such as those mentioned below are present in a case, the principal officer's recommendation should address the circumstances in detail. Circumstances, such as the following, would definitely meet the "exceptional circumstances" requirement:

(1) The employee has served the U.S. Government loyally and efficiently and the consular officer believes that continued service to the U.S. Government might endanger the life of the employee; and

(2) The employee has, in the course of faithful service, fulfilled responsibilities or given service in a manner that approaches the heroic. Obvious examples are prevention of a physical attack on a U.S. official or citizen at the risk of an employee's own life, or protection of U.S. property in time of war, uprising, natural disaster, or other grave local disturbance.

9 FAM 42.32(d)(2) N6.5-4 Other "Exceptional Circumstances" Cases

(TL:VISA-54; 02-28-1992)

Service "beyond the call of duty" can encompass less spectacular activities than those referred to in 9 FAM 42.32(d)(2) N6.5-3 above. In determining whether there are "exceptional circumstances" present, consular officers should assess the applicant's service to the U.S. Government in light of the following factors which sometimes individually, but typically in combination, constitute "exceptional circumstances." Examples include, but are not limited to, the following:

(1) The employee has served as an employee of the U.S. Government in a faithful and competent fashion for a period substantially exceeding the 15-year statutory minimum. The extent to which other factors set forth in this note are indicative of "exceptional circumstances" would have to be established according to how much time an employee has in service above the fifteen-year minimum. For example, "exceptional circumstances" would not be found unless there a substantial showing of factors such as those listed below in the case of an employee with 15 years of service (and in whose case the factors listed in the preceding note were lacking). On the other hand, the Department will give consideration to cases involving the excellent service of an employee with 20 or more years of employment in the United States Government -- a period substantially exceeding the statutory minimum;

(2) The employee has (or has had) high visibility in a sensitive position and the employee's performance as a representative of the U.S. Government in contacts with host government entities and other organizations has brought great credit to the agency by which employed;

(3) The employee's position with the U.S. Government requires control over key aspects of the operations of a Foreign Service post, and, thus, the overall functioning of the post. As an example, control over the finances of a post would be a favorable consideration. The consular officer should give particular consideration to an employee whose performance has resulted in substantial monetary savings for the U.S. Government or has yielded other significant benefits, the consular officer may give additional weight;

(4) The employee has been given individual awards in recognition of skill and personal usefulness to the U.S. Government. The merit of such awards is increased if it is apparent that there is a pattern of sustained high performance. Conversely, awards granted on a group basis have limited utility in establishing that one of the recipients of such an award is sufficiently exceptional to warrant classification under INA 101(a)(27)(D);

(5) The employee has, apart from performance of official duties, rendered valuable services and assistance to the U.S. community at post. The consular officer should also consider activities undertaken after termination of the employee's official employment relationship with the U.S. Government;

(6) The employee has served for an extended time in a responsible position in a country foreign to that employee, and has thereby lost economic and social ties in the home country. A person in these circumstances might find it extremely difficult to be at ease in either the country of service or the home country after retiring and might find it almost impossible to find suitable employment if that is necessary or desirable.

9 FAM 42.32(d)(2) N7 U.S. Government Employees in Canal Zone

(TL:VISA-54; 02-28-1992)

Many present or former U.S. Government employees in the former Canal Zone may qualify for special immigrant status under INA 101(a)(27)(D). The Department has concluded that changes brought about by the Panama Canal Treaty of 1977 and the Panama Canal Act of 1979 may constitute "exceptional circumstances." Recommendations from principal officers should include information explaining how, and to what extent, an individual employee has been affected by those changes. [See 9 FAM 42.32(d)(3) for other classifications available to Panama Canal employees.]

9 FAM 42.32(d)(2) N8 Special Immigrant Status for American Institute in Taiwan (AIT) Employees

(TL:VISA-191; 05-07-1999)

Sec. 201 of Pub. L. 103-416 amended INA 101(a)(27)(D) to permit both present and former employees of the American Institute in Taiwan to apply for special immigrant status. The employees' service before and after the founding of AIT is counted toward the minimum 15 years of service requirement.

9 FAM 42.32(d)(2) N9 Requiring Immediate Intent to Immigrate

(TL:VISA-331; 11-07-2001)

Special immigrant status was not designed for use as an "insurance policy" to protect an alien against the possibility of political or economic vicissitudes in the future. Nor was it the intent of Congress that the principal alien obtain special immigrant status solely to facilitate the entry of dependents into the United States when it is the principal alien's intent to return abroad to resume employment with the U.S. Government. The regulations in 22 CFR 42.32(d)(2)(i)A limit the validity of the special immigrant status to one year and that of the petition to six months for these reasons. Generally, a post should refrain from submitting a recommendation for special immigrant status to the Department until such a time as the employee has:

(1) Established an intention to resign the position being held; and

(2) Demonstrated an intention to immigrate to the United States within a designated period of time.

9 FAM 42.32(d)(2) N9.1 Certification of Active Intent to Pursue Immigrant Visa Application

(TL:VISA-11; 05-05-1988)

The principal officer must certify:

(1) The employee being recommended is prepared to pursue an immigrant visa application within one year of the Department's notification to the post of approval of special immigrant status; and

(2) The employee intends permanent separation from U.S. Government employment abroad no later than the date of departure for the United States following issuance of an immigrant visa.

9 FAM 42.32(d)(2) N9.2 Unanticipated Delays in Departure

(TL:VISA-54; 02-28-1992)

The Department recognizes that there may be circumstances in which local conditions at some posts may necessitate a delay in the alien's departure in compliance with the regulations and above guidance. If the principal officer concludes in a particular case that the delay has been or would be in the national interest, he or she should state this in the request and recommend an extension of validity.

9 FAM 42.32(d)(2) N9.3 Employees of Hong Kong Consulate General on or before July 1, 1999

(TL:VISA-331; 11-07-2001)

a. A special immigrant employee of the Consulate General at Hong Kong, **hired on or before July 1, 1999**, is not required to establish immediate intent to immigrate. Employees of the Hong Kong Consulate General who received or were approved for special immigrant status before July 1, 1999, may also continue employment.

b. Special immigrants exempted from the "immediate intent to immigrate" requirement, however, must be re-checked and re-approved for status before the special immigrant visa can be issued. (99 STATE 124186).

9 FAM 42.32(d)(2) N9.4 Effect of Numerical Limits

(TL:VISA-54; 02-28-1992)

a. The Department also recognizes, in this connection, that the imposition of a numerical limit on fourth preference special immigrants might prompt concerns about acquiring as early a priority date as possible, despite the regulations and the employee's travel plans. It is probable that visa numbers will be available for all such applicants except those chargeable to oversubscribed countries subject to the pro rata provisions of INA 202.

b. With respect to applicants from oversubscribed countries, the time limit on petition validity does not commence until a visa number becomes available. Principal officers may take this into account in submitting their recommendations.

9 FAM 42.32(d)(2) N10 Spouses and Children

(TL:VISA-191; 05-07-1999)

Consular officers should note that, although INA 101(a)(27)(D) refers to an employee or former employee and "accompanying" spouses and children, INA 203(d), relating to immediate family members of all preference immigrants, grants derivative status and priority dates to spouses and children of "accompanying or following-to-join." Spouses and children of U.S. Government employees accorded fourth preference status are, therefore, no longer required to be accompanying but may also follow-to-join the principal alien.

9 FAM 42.32(d)(2) N11 Fees

(TL:VISA-206; 05-22-2000)

Although the Secretary of State is authorized to establish a fee for the filing of a petition for special immigrant status as a U.S. Government employee, no fee has been established.